88-1600

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY and NEW EDUCATION DEVELOPMENT SYSTEMS, INC.,
Petitioners,

v.

DAVID MOLKO and TRACY LEAL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment precludes petitioners, legitimate religious organizations, from being held liable in tort for their non-violent and non-threatening speech and practices which persuade individuals to convert to petitioners' religious beliefs.

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, Holy Spirit Association for the Unification of World Christianity and New Education Development Systems, Inc. (collectively, the "Unification Church" or "Church") hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California (App., 1) is reported at 762 P.2d 46 (1988). The opinion of the California Court of Appeal, First Appellate District (App., 70) is reported at 179 Cal. App. 3d 450 (1986). The opinion of the Superior Court of the State of California (App., 109) granting summary judgment for petitioners is not reported.

JURISDICTION

The opinion of the California Supreme Court was entered on October 17, 1988. The Church's petition for rehearing was denied on December 1, 1988. On February 16, 1989, Justice O'Connor extended the time for filing a petition for certiorari to and including March 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975); *Fort Wayne Books, Inc.* v. *Indiana*, Nos. 87-470, 87-614 slip op. at 6 (Feb. 21, 1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule").

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

U.S. Const. amend. I.

STATEMENT

In this lawsuit, two former members of the Unification Church seek to recover damages for injuries that they claim to have suffered as a result of their conversion to the beliefs of the Church and of their becoming members of the Church. Thus, the allegations in this lawsuit are aimed at a core religious function—proselytizing—and the decision below, by permitting money damages to be recovered based on activities leading to religious conversion, constitutes a revolutionary challenge to the free exercise of religion.

Unificationism is a bona fide religion in the Judeo-Christian tradition.[1] Unification theology emphasizes the individual's personal relationship with God and the importance of concrete and practical manifestations of faith in everyday life. J. Biermans, *The Odyssey of New Religions Today*, 229-235 (Mellen Press, 1988). The Church's evangelical ministry in the United States began when the founder and spiritual leader of the Church, Rev. Sun Myung Moon, came to this country from his native Korea in 1971.

The process of "witnessing"—or sharing of one's faith with non-members of the Church—is a central facet of Unification Church beliefs and practices, as it is of virtually all religious faiths.[2] Respondents' claims in this case, although couched in familiar tort terminology of "fraud" and "emotional distress," are a direct challenge to the practice of "witnessing" or proselytizing in an effort to convert others to the proselytizer's beliefs.

1. On January 21, 1979, respondent Molko, who had recently graduated from law school and passed the Pennsylvania bar examination, arrived in San Francisco "perhaps to find a job or to take the California bar examination." App., 4. In San Francisco, Molko was approached

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[1] It is undisputed that the Unification Church is a bona fide religious faith. *See Colombrito* v. *Kelly*, 764 F.2d 122 (2d Cir. 1985); *Unification Church* v. *INS*, 547 F. Supp. 623, 628 (D.D.C. 1982); *Holy Spirit Ass'n* v. *Tax Comm'n of the City of New York*, 55 N.Y.2d 512 (1982); App., 88, n.14.

[2] The obligation to bring others into the faith is a central tenet of most Christian religions. *See* Mark 16:15 ("And he said to them, 'Go into all the world and preach the gospel to the whole creation' "); Matthew 28: 18-20 ("Go therefore and make disciples of all nations."); see also S. Ahlstrom, *A Religious History of the American People*, 807 (1972). The practice of sharing one's faith through conversion of non-believers is not held exclusively among Christian religions. *See Conversion to Judaism: A History and Analysis* (D. Eichhorn, ed. 1965); *H. Smith, The Religions of the World*, 89 (1958).

by two members of the Unification Church who engaged him in conversation and invited him to join them at their group home for dinner.[3] He accepted that invitation and attended the dinner with approximately 25 other persons, including other invited guests. After dinner, there was a lecture and presentation about "Boonville," a farm that was owned by the group and located a few hours drive from San Francisco. Molko and the other guests were invited to visit the farm. After some consideration, Molko—who was "impressed by th[e] hospitality and enthusiasm"—"finally agreed to go." App., 5.

Molko arrived at Boonville that evening and remained that for about a week. App., 7. During his time at Boonville, all of Molko's physical needs, including food and rest, were well met. The daily routine involved various lectures, discussion groups and prayer meetings which Molko "freely and voluntarily" attended. See Molko Dep. I, 124-145, 165-166. "Molko was at all times free to leave Boonville and knew that buses returning to San Francisco left daily." App., 75-76.[4]

On January 26, Molko accepted an invitation to attend a series of advanced seminars at another location,

[3] Molko stated that he accepted the dinner invitation because he was "curious" and because he was new in town and "looking to meet new people and form an opinion of whether [he] wanted to stay in San Francisco." Molko Dep., Vol. I, 62-63 (hereinafter "Molko Dep. I"). According to respondent Molko, the men told him that they lived in an "international community of some sort." Molko Dep. I, 61. Molko also testified that, out of "curiosity," he asked if the "community" had any "religious connection" to which the men allegedly answered "no." Molko Dep. I, 95. He admitted, however, that he was unsure whether he would have rejected the offer even if he had known that the group was religious in nature. *Id.* at 96.

[4] Molko stated that, although he was initially "bored," he stayed at Boonville because he had met people he would "like to get to know better" and because he appreciated the opportunity to consider what he could do to make his own life, and that of others, more "meaningful." Molko Dep. I, 176-179.

known as Camp K. According to Molko, it was during his stay there that he learned "for the first time" (on his 12th day with the group) that the group was part of the Unification Church.[5] Despite this "revelation" and the fact that Molko "was not physically restrained there and knew he was free to leave," App., 76, Molko chose to remain at Camp K. Several months later, he formally joined the Church. On July 26, 1979, as he was leaving the final session of the California bar examination, Molko was forcibly abducted by "deprogrammers" and taken to a motel where he was held against his will. After three days of involuntary confinement and "deprogramming," Molko renounced his faith in the Unification Church.

The facts relevant to respondent Leal's claims are, in all material respects, the same as those relating to Molko's. In June, 1979, Leal, a student at San Diego State University, was on her way to visit a college in nothern California when she was approached by two members of the Church and invited to dinner. Like Molko, she listened to a lecture about Boonville and she accepted the invitation to go there. App., 9. She later agreed to attend the seminars at Camp K, where she claims to have learned for the first time (on her 22nd day with the group) that the group was part of the Unification Church.[6] Leal chose to remain with the group and sev-

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[5] There is evidence that Molko knew of the group's affiliation from the outset. *See, e.g.*, App., 7, 127; Molko Dep. I, 159-160; Clerk's Transcript on Appeal ("CT"), at 179, 278. However, for purposes of summary judgment, the trial court "resolved these questions in favor of [respondents]." App., 80. Thus, in the present posture of the case, it was assumed that the members of the Church "did not originally disclose that they were affiliated with the Unification Church" or that they affirmatively denied or misrepresented their affiliation. *Id.*

[6] Leal stated that she was aware, from the outset, that the group was Christian in nature and philosophy. Leal Dep. I, 61; Leal Dep. III, 76. However, she alleged that the group misrepre-

eral months later formally became a member of the Unification Church. On October 29, Leal was forcibly abducted from a Los Angeles street by "deprogrammers." Leal, like Molko, was incarcerated for a number of days until she ultimately agreed to renounce her faith.

Neither Molko nor Leal has claimed that anyone associated with the Church ever used actual or threatened physical force or restraint to compel them to remain with the group or to join the Church. See Leal Dep. II, 279. Rather, respondents claimed that the Church used "psychological" manipulation involving sincere affection, positive reinforcement and "guilt" to persuade them to join the Church. This phenomenon—which respondents refer to as "brainwashing," "coercive persuasion" or "thought reform"—is vital to respondents' claims against petitioners.

2. Respondents filed suit against the Church in California Superior Court, alleging claims of fraud, intentional infliction of emotional distress, false imprisonment and restitution.[7] The gist of the fraud claim was that the deception by petitioners' representatives—in both not disclosing their relationship to the Church and in misrepresenting their Church affiliation—caused respondents to be exposed unwittingly to petitioners' proselytizing. Complaint, ¶ 42. Because of petitioners' "brain-washing" or "coercive persuasion," respondents were damaged by being "induced to join the Unification Church." Complaint, ¶ 44-45.

Respondents also alleged that petitioners' "fraudulent inducement into an atmosphere of coercive persuasion . . . [was] extreme and outrageous" conduct which would

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sented their identity to her when, in an early conversation, she inquired if they were "Moonies."

[7] Respondents' complaint alleged several other causes of action "which were abandoned prior to the entry of judgment [in the trial court]." App., 72 n.3.

support a claim of "intentional infliction of emotional distress." Complaint, ¶ 64. Finally, Molko sought restitution for a $6000 donation he had made to the Church several months after he had become a member.[8] The restitutio nclaim arose "directly out of his fraud theory: he assert[ed] that the Church deceived him into unknowingly submitting to coercive persuasion, thereby obtaining undue influence over him which it later used to extract the gift." App., 34.[9]

On petitioners' motion for summary judgment, the superior court held that "even on [respondents'] version of the facts, no viable causes of action could be stated." App., 74 n.4.[10] With respect to the fraud claim, the trial court noted that respondents admitted that they knew the identity of the Church for some time before they suffered the "damage" of being "induced to join the

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[8] Respondents' false imprisonment claim was dismissed below and is not part of this petition. The court of appeals noted that "during the period of his alleged imprisonment, Molko commuted to a bar review course." App., 96. Molko subsequently dropped his false imprisonment claim before it reached the California Supreme Court. App., 34. Leal readily admitted—and the courts below have unanimously found—that she was:

> free to depart at any time; she was not physically restrained, subjected to threats of physical force or subjectively afraid of physical force.

App., 34. Because Leal was never threatened, coerced or physically restrained, summary judgment was granted for petitioners on her false imprisonment claim and that judgment was upheld by the California Supreme Court. *Id.*

[9] The Church filed cross-complaints against the "deprogrammers" and others for violation of the Church's federal and state civil rights (42 U.S.C. § 1985; Cal. Civ. Code, §§ 51.7, 52). App., 2-3. The court of appeal reversed the dismissal of this cross-complaint and that judgment was affirmed by the California Supreme Court.

[10] As the court of appeal correctly noted, the "facts regarding the occurrences giving rise to this lawsuit are essentially undisputed." App., 74.

Unification Church." [11] Accordingly, the trial court held that because respondents had actual knowledge of the facts, they could not have justifiably relied on any initial misstatement or nondisclosure of the group's affiliation. On the claim of intentional infliction of emotional distress, the trial court held that the Church's "conduct was not extreme and outrageous in the sense required to support such a cause of action." App., 129. Finally, on the claim for "restitution," the court found that "Molko's own uncontroverted description of the circumstances under which he made the gift [of $6000] demonstrates that he did so out of a then held religious belief." *Id.* at 98. Accordingly, the court held that the donation was legitimate and that any "misrepresentations" or nondisclosures in his initial contact with the group were cured (or, at least, not relied upon) at the time Molko made the donation.

3. The court of appeal unanimously affirmed the judgment for petitioners. On the fraud claim, the appellate court first affirmed the lower court's "uncontroverted" finding that the respondents knew the truth regarding the alleged misrepresentations "within two to three weeks of their first contact . . . and before joining the Unification Church and engaging in its work . . . ." App., 81. Respondents, however, "endeavor[ed] to avoid the seemingly fatal consequences of these undisputed facts by alleging that during the brief period before the truth was revealed to them, agents of the Church had gained

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[11] The trial court stated:

> [U]nquestionably, when [respondents] learned the group was part of the Unification Church, they did not leave or attempt to leave, although they knew that they might have done so. Their actions reflect that it was not their unawareness of defendants' affiliation that caused them to stay.

CT. 988. It is undisputed that respondents were fully aware of the identity of the group within, at most, 12 to 22 days of their initial contact and well before the time they joined the Church. *See supra*, p. 5.

control of their minds [through 'coercive persuasion'] thereby rendering them incapable of resisting the inducements to join the Church . . . ." *Id.* In other words, respondents argued not that they were deceived into joining the Church but rather that they were induced into a situation where they could be "coercively persuaded" to join the Church.

The court held that the respondents' theory of "coercive persuasion," [12] must be rejected on "constitutional grounds" because such a theory would ask the jury to find that "healthy adults were induced to join the Church and to change their life style as a result of 'brainwashing' rather than by religious faith . . . ." *Id.* at 86 (citing *Katz* v. *Superior Court*, 73 Cal.App.3d 952, 987-988 (1977)).[13] "[B]ut, it would not be possible . . . to reach th[at] result without questioning the authenticity and the force of the Unification Church's religious teachings and permitting a jury to do likewise, which is constitutionally forbidden." *Id.* at 89 (citing *United States* v. *Ballard*, 322 U.S. 78, 87 (1944)). Thus, "[i]f liability could be imposed in such circumstances, any disaffected adherent of a religion could bring suit alleging that he had been 'brainwashed' by the religious organization, and courts would become entangled in determining which former adherents acted out of true faith and which were subject to 'mind control.' " *Id.* at 92.[14]

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[12] Respondents submitted the declarations of Dr. Margaret Singer, a psychologist, and Dr. Samuel Benson, a psychiatrist, in support of their theory of "brainwashing" or "coercive persuasion."

[13] The court noted that the respondents had conceded both "the bona fides of the Unification Church's religious beliefs" and the fact that they, at the time of their conversion, had "sincerely adopted those beliefs." *Id.* at 88.

[14] On the respondents' claim for intentional infliction of emotional distress—based on the use of "coercive persuasion"—the court held that, for the reasons explained in reference to the fraud claim, the theory of "mind control" cannot constitutionally be employed to

With respect to Molko's claim for restitution of his gift of $6000 to the Church, the court held that the claim —like the claim of "fraud"—must be dismissed because the claim turned on the constitutionally impermissible "brainwashing" or "coercive persuasion" theory:

> A former member of a religious organization who, like Molko, made a gift on the basis of religious beliefs he no longer holds cannot challenge the validity of the gift without challenging the validity of his former beliefs. Inquiry into the reasonableness of the beliefs which prompted him to make the contribution is, however, foreclosed by constitutional guarantees of freedom of religion.

Id. at 99. Thus, the court of appeal affirmed the trial court's grant of summary judgment on all counts in favor of petitioners.

4. The California Supreme Court reversed on all three counts. On the fraud claim, the court stated:

> The legal question is simply whether a religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion.

Id. at 24. The court stated that the answer to that legal question required weighing the state's interest in preventing fraudulent induction into a setting of "coercive persuasion" "against the severity of the burden imposed on religion." App. 19.[15]

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impose liability upon the Church." App., 93. With respect to respondents' alternative argument that they were injured emotionally by the "threats of . . . divine retribution" against those who left the Church, the court held that such alleged "threats" were "protected by the First Amendment and cannot form the basis for a claim. . . . " *Id.* at 94.

[15] The "initial inquiry" was whether allowing the actions to go forward would "implicate" petitioners' religious *beliefs* or merely

According to the court, the only impact of such claims on the Church was the "burden" on the Church's efforts to recruit new members by means of "coercive persuasion." *Id.* at 23-24. Such a "marginal" (*id.* at 25) burden

> is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion.

Id. at 26-27. Accordingly, the court held that summary judgment was improperly granted and that a jury should be permitted to determine whether "Molko and Leal were, by means of coercive persuasion, rendered unable to respond independently upon learning that they had been deceived . . . ." *Id.* at 28.[16]

The court followed essentially the same reasoning on the other two claims. On the claim of intentional infliction of emotional distress, the court reversed the judg-

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their "religiously motivated *conduct*." *Id.* at 22. The court held that there was no burden on any religious belief because "[t]he challenge here . . . is not the Church's teachings or to the validity of a religious conversion." *Id.* at 24.

[16] The court made no attempt specifically to define the legal or psychological parameters of any theory of "coercive persuasion." Indeed, the court noted that the very existence of the phenomenon referred to as "coercive persuasion" or "brainwashing" is "controversial." Despite this uncertainty, the court stated that the "basic theory" is that:

> brainwashing "is fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and [of] the ability to think independently, which induces a subject's unyielding compliance and the rupture of past connections, affiliations, and associations."

Id. at 14 (quoting *Peterson* v. *Sorlien*, 299 N.W.2d 123, 126 (Minn.), *cert. denied*, 450 U.S. 1031 (1981).

ment for petitioners, allowing respondents to proceed on the theory that the "fradulent inducement into an atmosphere of coercive persuasion . . . is extreme and outrageous." *Id.* at 32. Finally, the court noted that Molko's restitution claim "is a natural extension of his fraud theory: he contends, in effect, that one of his damages from the fraud was the $6000 loss." *Id.* at 35. Again, the court held that "a triable issue of fact exists as to whether Molko lost his ability to make independent decisions as a result of being deceived into submitting unknowingly to coercive persuasion." *Id.* at 36. Thus, the two claims (for emotional distress and restitution) are derivative of the "fraud" claim.

Justice Anderson dissented. He stated that "the imposition of tort liabilty" for "religious persuasion" "runs counter to established legal precedents and the free exercise clause of the First Amendment" because (1) "the indoctrination achieved by persuasion absent physical force or violence is not unlawful;" and (2) "religious conversion is simply not subject to judicial review." *Id.* at 43.[17]

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[17] On the first point, Justice Anderson cited a number of lower court cases that had held that religious persuasion—even if labelled psychologically "coercive"—is not itself actionable and is otherwise protected by the First Amendment. *Id.* at 47-48. On the second point, he noted that the issue on which the majority had remanded for trial—*i.e.*, whether the conversion (or "brainwashing") was induced by coercive inodctrination or religious persuasion—would inevitably raise questions "so inextricably intertwined with religious faith that they cannot be scrutinized, much less proven without questioning the authenticity of the religious teachings of the Church." *Id.* at 50-54. The dissent then cited decisions of this Court and lower federal courts in support of the proposition that the First Amendment absolutely precluded any inquiry into "the truth or falsity of religious faith." *Id.* at 51. Finally, the dissent held that, even if the coercive persuasion theory were not absolutely barred, imposition of tort liability based on such a theory did not further any narrowly tailored state interest. *Id.* at 57-59.

REASONS FOR GRANTING THE PETITION

The California Supreme Court has decided an issue of fundamental importance to all religious groups in a way that is inconsistent with prior decisions of this Court and with the decisions of several lower federal and state courts. If left undisturbed, this decision will severely curtail the proselytizing and missionary activities of most religious organizations. By exposing petitioners to liability for "coercive persuasion" undertaken to bring new members into the Church, the opinion below has created a new theory of tort liability based entirely on protected religious activity. The petition thus presents an important question which will have widespread effect on religious practice and which therefore requires a definitive resolution by this Court now.

1. In considering the scope and necessary implications of the issues presented in this case, it is helpful to put aside what this case does not involve. First, this case does not involve "a traditional cause of action in fraud." App., 24.[18] Respondents are not complaining about the

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[18] Fraud traditionally exists where there are misstatements or omissions of fact which cause a person to part with money or property of value. *See McNally* v. *United States*, 107 S. Ct. 2875, 2880-2881 (1987); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). If respondents sought to recover damages on such a "traditional cause of action in fraud"—*i.e.*, losses directly attributable to their detrimental reliance on a misleading statement—the First Amendment would not be implicated. See *infra*, n.22.

Certainly, petitioners never have suggested that their status as a religious organization grants them immunity from traditional common law torts. Indeed, the issues raised in this petition in no way involve respondents' rights to recover any "damages" they may have suffered during the period of time (12 or 22 days) that they allegedly spent with the Church before they learned of the Church's identity. Such a "traditional" fraud claim was not brought by respondents because the alleged fraud caused no out-of-pocket or other damages to them. *All* of respondents' injuries in this case are alleged to have derived from the fact of *joining the Church*—an act which was freely and knowingly undertaken and not attributable to any fraud. *See supra*, pp. 5-6.

consequences of their reliance on an alleged falsehood or concealment of material fact; they are complaining about the consequences of their conversion to the Unification Church. Respondents' *only* claim, and the *only* basis for their damages, is that they were deceived into a situation in which they could be converted. As the California Supreme Court noted, the only "triable issue of fact" is whether their conversion was a legitimate religious experience or a "brainwashing"—which that court regarded as actionable in tort.[19]

Second, with respect to the "coercive persuasion" (also referred to as "brainwashing" or "thought reform") theory which lies at the heart of this case, this is not a case involving physical restraints, force or threats of force. Although respondents have labelled petitioners' proselytizing efforts "coercive," respondents have never claimed that the "persuasion" at issue resulted from anything other than emotionally compelling speech. *Cf. NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982);

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[19] Respondent Molko's complaint specifies that as a "proximate result" of the fraud, he suffered the "injury" of being "induced to join the Unification Church and work long hours to 'further its purpose . . .'" Complaint, ¶ 15. But, the initial deception—*i.e.*, the alleged failure of the Church members to identify themselves as "Moonies"—did not "cause" the injury complained of because at the time Molko joined the Church, he clearly was aware of the Church's identity. Thus, by definition, Molko could not have been *relying* on the alleged "deception" at the time he was "induced to join" the Church. The theory of "brainwashing" or "coercive persuasion" is the only way for respondents to provide the "causal link" between the "traditional fraud" (the alleged misstatement) and the "damages" (the conversion to the Unification Church).

The claims for recovery for emotional distress and for restitution also are derivative of the Fraud claim in that they seek to recover for specific types of damages that respondents allegedly suffered as a result of their conversion. If the act of religious conversion based on "coercive persuasion" is not actionable, then respondents should not be permitted to recover anything for these other claims.

Parnell v. *Superior Court*, 119 Cal. App. 3d 392, 173 Cal. Rptr. 906 (1981).

Respondents' claims also do not involve minors or mentally incompetent persons. *Cf. United States* v. *Kozminski*, 108 S. Ct. 2751 (1988). Rather, this is a case in which adult former members of a church, who have now repudiated the beliefs of that church, are seeking compensation for the time and donations that they knowingly and willingly provided to the church during the period of their undisputably sincere adherence to the church's religious teachings. That claim rests on acceptance of their argument that the use of non-violent and non-threatening religious proselytizing is wrongful conduct which can give rise to damages ordered by a state court. That issue requires review by this Court.[20]

2. In upholding the claim for damages based on respondents' exposure to "coercive persuasion," the decision below conflicts with the decisions of this Court applying the Free Exercise Clause. The exposure to liability in the circumstances of this case is an unbounded intrusion into petitioners' right to free exercise. Such tort liability is in no way narrowly tailored to serve a compelling state interest; instead, the holding below constitutes a wholly indefensible assault on the core values of religious freedom.

There can be no question that the liability created in this case directly and substantially burdens petitioners'

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[20] Because the legal issue was decided by the courts below on a record which is essentially undisputed (*see* note 5, *supra*) there would be no advantage to this Court in requiring the case to proceed to trial. If petitioners were to prevail before a jury, the decision of the California Supreme Court has had, and will continue to have, an immediate chilling effect on the proselytizing activities of a broad spectrum of religious groups. Moreover, the very fact of having to defend the Church's First Amendment protected conduct in a complicated jury trial imposes irreparable harm to petitioners' Free Exercise rights.

free exercise of religion. The process which respondents characterize, in psychological jargon, as "coercive persuasion" or "the systematic manipulation of social influences" is merely the ability to proselytize and "convert" others to the beliefs and practices of a religion. This goes to the very heart of this or any other Church's religious practice. As the Court has long recognized, the "right to free exercise of religion unquestionably encompasses the right to preach, proselyte and perform other similar religious functions." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion). The "spreading of one's religous beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110 (1943); see *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953).[21]

The "conduct" at issue here—non-threatening but successful attempts to persuade respondents to adopt the beliefs and values of the Unification Church—unmistakably involves the most intimate combination of speech, association and religious exercise. Thus, the State's decision to award tort damages based upon the successful "conversion" of respondents to the Unification Church's beliefs is the type of infringement of petitioners' fundamental rights that triggers heightened judicial scrutiny under the First Amendment. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine* v. *Falwell*, 108 S. Ct. 876 (1988). Accordingly, the theory of the case below which posits liability based on "coercive presuasion," can be sustained only if the imposition of liability

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[21] The decision below, in effect, renders a certain "religious practice [*i.e.*, proselyting] illegal" and is accordingly, subject to the strictest judicial scrutiny. *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961).

can be shown to be "the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Board of the Indiana Employment Sec. Div.*, 450 U.S. 707, 717-718 (1981); *see Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) ("[o]nly the gravest abuses, endangering paramount inteersts, give occasion for permissible limitation" of free exercise rights) (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

The court below articulated three state interests which it believed to be sufficiently compelling to justify the conceded burden on petitioners' religion: (1) an interest in preventing "fraudulent conduct"; (2) an interest in "protecting families from suffering" from the "stress" which occurs when a family member joins a "cult" "as a result of fraud and deception"; and (3) an interest in "preventing" exposure of individuals to "coercive influence." App., 25-27. None of these interests in the context of this case can be deemed compelling. Yet, assuming *arguendo* that one could hold that the interests are compelling, the most cursory analysis shows that the creation of the new tort liability at issue is not "narrowly tailored" to further such interests.

The only real state interest implicated by the California Supreme Court's novel tort theory [22]—the interest

[22] The first articulated state interest, in protecting against "fraudulent conduct," already is served by existing tort actions for fraud. *See Yoder*, 406 U.S. at 215, 235 (rejecting state interest because interest "otherwise served"). If respondents have suffered any damage as a result of detrimental reliance on petitioners' "fraudulent conduct," *i.e.*, misstatements or omissions made at the outset of the relationship, then the state's interest is fully vindicated by the existing common law tort of fraud which permits recovery of all pecuniary losses suffered in detrimental reliance upon those stateemnts. *See supra*, n.18. But, the state's interest in

in preventing "brainwashing" or "coercive persuasion"—is not a legitimate, let alone compelling, state interest. Despite the psychological label, "coercive persuasion" is merely a euphemism for "speech" and related religious activity. In this case, it is speech about vitally important public and private issues (*cf. First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978)) and it is speech designed to encourage association for the purposes of promoting the religious beliefs of the speaker. *Cf. NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982). No one has ever suggested that "coercive persuasion" involves any conduct that is itself unlawful or tortious (unless, as the court below found, the *persuasion* itself is tortious). Nor has anyone suggested that the "speech" in question, *i.e.*, the "witnessing" or proselyting of the Unification Church members, is "outside" the protections of the First Amendment. See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Miller* v. *California*, 413 U.S. 15 (1973); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969).

Indeed, the conduct challenged here should—by definition—enjoy double constitutional protection. "Persuasion" is speech, and religious persuasion is speech plus the free

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deterring fraud provides no compelling reason to *expand* the existing tort into a remedy for religious conversion by "coercive persuasion."

The second articulated interest merely invokes the states' concern for protecting the family of the person who may be defrauded. This interest is merely a component of the other two interests and it adds nothing to them. The family suffers no independent injury from a fraud perpetuated upon an individual member of the family. Nor does the family have a distinct interest in protecting an adult member from being converted to a religion if the adult member has no basis to complain. Thus, if the Constitution does not permit a court to interfere with the conversion process on behalf of the individual, then it clearly does not permit the state to step in to protect family members who oppose the individual's conversion.

exercise of religion. Labelling either of these as "coercive" adds nothing to the analysis because coercive persuasion is nothing more than successful persuasion. It is clear that if respondents had never been converted, the petitioners' efforts at "persuasion" would not have been deemed tortious under the California Supreme Court's decision. Thus, petitioners' efforts at religious persuasion were held to be actionable only because they were successful.

At bottom, "brainwashing" or "coercive persuasion" is —at most—a theoretical explanation for why certain speech can be persuasive. See *infra* n.33 & pp. 23-25. But, this Court has specifically stated that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Claiborne Hardware*, 458 U.S. at 910. The state's asserted interest in protecting its citizens from "overly persuasive" religious speech and conduct designed solely to convert someone to a new religious faith clearly cannot constitute a compelling state interest. Otherwise, the state court will be given the authority to decide for itself what religious conversion experiences are appropriate and which involve an abuse which can be severely curtailed or perhaps even absolutely prohibited.

Absent physical violence or other tortious conduct, the state cannot leave unorthodox religious organizations to the not-so-tender mercies of a jury to decide whether statements made by church representatives to persuade new members to join the church are acceptable. It is difficult to imagine a more direct or frightening challenge to the concept of the free exercise of religion. In sum, there is no state interest sufficient to support the extraordinary expansion of state tort law adopted by the California Supreme Court. See *Paul* v. *Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 289 (1987); *cf. Wisconsin* v. *Yoder*, 406 U.S. at 221 (1972) (reviewing court

must "searchingly examine the interests that the State seeks to promote. . . .")[23]

3. The decision below also is inconsistent with the decisions of this Court, and other courts, which have held that the truth or validity of religious beliefs cannot be scrutinized in the courts. In *United States* v. *Ballard*, 322 U.S. 78 (1944), for example, the government had brought a mail fraud prosecution against members of the "I Am" religious movement charging that the movement had solicited funds and membership "by means of false and fraudulent representations." *Id.* at 79. This Court held that, whatever the basis for such a prosecution, the court and jury were not free to inquire into the validity of the defendants' religious beliefs. In a frequently cited passage, this Court observed:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained *false representations*. . . . When the triers of fact undertake that task, they enter a forbidden domain . . . .

Ballard, 322 U.S. at 87; *see also Watson* v. *Jones*, 80 U.S. (13 Wall) 679, 728 (1871) ("[t]he law knows no heresy") (emphasis added); *Presbyterian Church* v. *Mary*

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[23] As the court below correctly noted, respondent Molko's "separate" claim for restitution is merely an "extension of his fraud theory; he contends, in effect, that one of his damages from the fraud was the $6000 loss." App., 35. Thus, to the extent the First Amendment stands as a barrier to the fraud claim, it also precludes recovery on the "restitution" cause of action. Similarly, if the respondents are not permitted to recover in a common law fraud claim based on defendants' alleged conduct in "inducing" them into an atmosphere of "coercive persuasion," they also should not be permitted to recover damages for "emotional distress" based on the same conduct.

Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (courts cannot resolve disputes that necessarily require them to weigh the significance and meaning of religious doctrines).

Several lower federal courts and state courts have refused to allow tort claims against religions based on theories of "coercive persuasion" or "brainwashing" on the ground that, under *Ballard*, "indoctrination and initiation procedures and conditions of membership in a religious organization are generally not subject to judicial review." *Lewis* v. *Holy Spirit Ass'n*, 589 F. Supp. 10, 12 (D. Mass. 1983) (citing *Ballard* and dismissing tort claims based on "coercive persuasion" to Unification Church beliefs); *Meroni* v. *Holy Spirit Ass'n*, 506 N.Y.S.2d 174, 178 (N.Y. App. Div. 1986) (dismissing tort claims against Uni,fication Church based on claims of "brainwashing" "practices designed to persuade [plaintiff] to adopt the church's religious beliefs").[24]

The "coercive persuasion" theory conflicts with *Ballard*, and the decisions of those lower courts which have faithfully applied it, because it suggests to the jury that no one would freely choose to adopt the belief system of the petitioners. In other words, the theory of coercive persuasion—which is itself a subjective explanation of respondents' conduct—contains an implicit value judgment

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[24] *See also In re Pollin*, 675 P.2d 1013 (Okla. 1983) (reversing order imposing guardianship for young woman who had allegedly been "brainwashed" by religious organization on grounds that such application of guardianship law "invades the area of personal ideas, thoughts and beliefs"); *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1162 (D.C. Cir. 1969) (reversing jury verdict that religious practices and literature were accompanied by "false or misleading labelling", holding such an inquiry impermissible under *Ballard* because "a finding that the seized literature misrepresents the benefits [of the religious practice] is a finding that [the] religious doctrines are false"). *Id.* at 1156.

regarding the Church's beliefs.[25] As the trial court explained:

> both [experts] rest their opinions in large part upon the view that [petitioners'] recruitment techniques involve "systematic manipulation of social influences" which . . . lead [respondents] to make choices they would not have made in the "free exercise of [their] own will and intellect." But these are not statements which are either true or false; they are veiled value judgments concerning the entire outlook of the Unification Church.

App., 125; see App., 137-143 (declarations of respondents' expert witnesses).[26]

Moreover, as the court of appeal noted, a court cannot accept the theory of "brainwashing" or "coercive persuasion" as an explanation for respondents' conversion "without questioning the authenticity and force of the Unification Church's religious teachings and permitting a jury to do likewise, which is constitutionally forbidden." App., at 89. This Court should grant certiorari to resolve the conflict on this important and recurring issue of religious freedom.

4. By permitting respondents to proceed to trial on their claims to recover damages allegedly suffered as a result of religious conversion, the decision seriously threatens the day-to-day activities of virtually all re-

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[25] *See* Robbins, *"Uncivil" Religions*, 61 Thought 277, 280 (1986) (coercive persuasion theories "frequently entail sinister clinical interpretations of behaviors and processes which might otherwise be seen merely as indicative of intense religious commitment"); Balch, *What's Wrong with the Study of New Religions*, Scientific Research and New Religions, 25 (B. Kilbourne, ed. 1985).

[26] According to the trial court, respondents' experts essentially "reasoned backwards" from their disapproval of the Unification Church (and its beliefs and methods) "to the conclusion that [respondents] were not thinking freely because they were persuaded by them." App., *infra*, 125, n.5.

ligions. Obviously, the burden of tort litigation brought by disillusioned former members falls most heavily on minority, or "new" religions. Those religions are as entitled to First Amendment protections as any other and certainly need them more. But, there is no question that the theories of ilability for "coercive persuasion" announced by the California Supreme Court can—and almost certainly will—be used in litigation against mainstead religions. The theory of "coercive persuasion" or "thought reform," as it is articulated in the decisions below is so broad and so vague that it can reach literally any religious organization.

Indeed, the "brainwashing" or "coercive persuasion" theory is cutting a wide and dangerous swath through the common law. One of the experts who has submitted a declaration in support of the respondents in this case, Dr. Margaret Singer, has offered identical testimony in myriad law suits across the country. For example, Dr. Singer has presented her unique psychological theories in tort litigation involving instruction in Transcendental Meditation,[27] "est" seminars[28] and Lifespring five-day "personal development" programs.[29] She even has offered her testimony regarding "systematic manipulation of psychological and social influence techniques" in routine

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[27] *Kropinski* v. *World Plan Executive Council*, 853 F.2d 948 (D.C. Cir. 1988). In the trial of that case, Dr. Singer testified that "the thought reform program had its impact on [plaintiff] in that it caused him to change his world view." *Kropinski* v. *World Plan Executive Council*, No. 85-2848 (D.D.C. 1986), Transcript of Trial (12/11/86) at 121. On appeal, a panel of the District of Columbia Circuit questioned whether such testimony met the standards of "scientific acceptability" but did "not address defendants' argument that plaintiff's theory of thought reform would burden their First Amendment rights." 853 F.2d at 957.

[28] *Slee* v. *Werner Erhard*, No. N-84-497-JAC (D. Conn.).

[29] *Miller* v. *Lifespring Inc.*, Civ. No. 8678590 (Cal. App. Dep't Super. Ct.).

commercial litigation. In opposition to a motion for summary judgment by Snap-On Tools Corporation in franchise litigation, Dr. Singer submitted an affidavit that stated:

> it is my opinion that Snap-On Tools Corporation employs techniques of psychological manpulation to influence the actions of its dealers . . . Normal individuals subjected to coordinated programs of coercive influence and psychological manipulation can be psychologically managed and dominated without knowing they have been manipulated.

Declaration of Margaret Singer, at 2 (June 24, 1988) (in *Lowder* v. *Snap-On Tools Corp.*, No. 615484 (Cal. App. Dept. Super. Ct.).[30]

The theory of "coercive persuasion" completely undermines the concept of free will inherent in all common law civil and criminal law doctrines.[31] The theory allows litigants (1) to create an "intermediate" state-of-mind exception in which the "victim" is neither incapacitated nor responsible for his own actions; and (2) to attribute

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[30] In the recent criminal prosecution of an admitted "deprogrammer" for the kidnapping and week-long captivity of a Denver Unification Church member, *People* v. *Whelan*, No. 87CR2056 (Denv. Dist. Ct. Nov. 4, 1988), Dr. Singer testified in support of the defense's contention that the forcible kidnapping was necessary—as the "lesser of two" evils—in light of the Church's use of "thought reform" to convert the victim. In accordance with that testimony, the trial judge—over First Amendment objection—agreed to provide the jury with the requested "choice of evil" or necessity defense and the kidnappers were acquitted. *See People* v. *Whelan*, Transcript (Sept. 22, 1988) at 4-11; *see also Kidnap Trial Fosuses on Church Teachings*, Rocky Mountain News, Oct, 22, 1988 at 3; *"Evils" Defense Allowed; Landmark Ruling in "Moonie" Case*, Denver Post, September 23, 1988; *Moonie Verdict Denounced as Threat to Religious Rights*, Denver Post, Nov. 6, 1988, at 1-B.

[31] *See, e.g.*, Calamari & Perillo, *Contracts*, §§ 121-135 (1970) (explaining limited exceptions, such as infancy, insanity and duress, to usual presumption of capacity to contract).

the otherwise indisputably "voluntary" conduct of the victim to "coercive persuasion" and thereby expand liability or escape a defense to liability.

At bottom, however, the most dangerous aspects of this "new" theory of liability is the fact that it constitutes a direct assault on the heart of First Amendment protected activity. All organizations that have a strong system of beliefs and that forcefully advocate and inculcate that belief system can be readily found to engage in "brainwashing" under the definition accepted by the court below.[32] This means that religious, self-help groups, law schools[33] and political and social advocacy groups may be threatened with the imposition of liability based on their non-violent and non-threatening persuasion and advocacy. And, if the prevention of psychologically coercive speech and practices can constitute a "compelling state interest," which permits a jury to approve or disapprove the advocacy at issue and impose damages, then the harm to fundamental constitutional values that this theory permits is virtually limitless.

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[32] Dr. Singer has described the "special circumstances and conditions" in which "brainwashing" or "coercive persuasion" occurs. App., 149. According to Dr. Singer, an organization will

1. get "control over the person's social and/or physical surroundings";
2. get "control over the person's time";
3. manipulate "rewards, punishments and experiences" to "elicit" or inhibit certain behavior in the person;
4. keep the person "unaware" of the manipulation; and
5. adopt an "authoritarian" organizational structure so that there can be no effective criticism of the organization.

App., 149-150. Obviously, this "definition" of coercive persuasion is so broad—and potentially covers so many religious, political, social, educational and military organizations—as to be virtually meaningless.

[33] *See* Halpern. *On the Politics and Pathology of Legal Education*, 32 J. of Legal Ed. 383 (Sept. 1982).

There is no doctrinally defensible distinction between speech which succeeds in persuading mature adults to change religions and that which succeeds in persuading them to change political parties. Both may be controversial and disruptive to family and other existing relationships, but both are solidly protected by the First Amendment. The only conceivable difference is that political persuasion is covered by one of the First Amendment's specific guarantees, where the successful religious persuasion is covered by two.

Accordingly, the court should grant the petition and resolve the conflict in judicial authority concerning the proper balance to be struck between the First Amendment's protection of religious proselytizing and conversion and the state's interest, if any, in protecting its citizens from psychologically "coercive" speech and religious practices.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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